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January 16, 1998

VIA FACSIMILE AND U.S. MAIL

Ms. Leslie Kirby
Assistant Regional Counsel
U.S. EPA, Region V
77 W. Jackson Boulevard C-29A
Chicago, IL 60604

Re: United States Environmental Protection Agency demand for reimbursement of costs expended at Site Q of the Area 2 Sauget Superfund Site at Sauget, Illinois
Pillsbury Matter No.
Our File No. 55-1

Dear Ms. Kirby:

This letter responds to the United States Environmental Protection Agency's (EPA) November 14, 1997 letter to The Pillsbury Company ("Pillsbury" or "Company"). In that letter, EPA demands that Pillsbury remit to it $170,652.85 in restitution for costs expended by EPA at Site Q of the Area 2 Sauget Superfund Site at Sauget, Illinois ("the Site"). For the reasons set forth below, Pillsbury does not believe that there is any legal basis which requires Pillsbury to pay these costs.

I. Facts

The business conducted by Pillsbury in Sauget, Illinois, for which EPA seeks to hold the Company liable, was a grain and commodity transferring operation. From June 30, 1979 until 1988, Pillsbury leased approximately 84 acres of property on the East Bank of the Mississippi River at Sauget ("the leased property" or "the property"). The owner of the leased property was the Riverport Terminal and Fleeting Company. Pillsbury maintained facilities at the property for the unloading, loading and temporary storage of grain and other commodities, which were

transported on railroad cars, trucks and river barges. In 1988, Pillsbury transferred its interest in the leased premises to ConAgra Company, Omaha, Nebraska.[1]

In conjunction with its activities at the leased property, Pillsbury made arrangements with a contractor to lay railroad track at the facility. The track, when completed, would have been used to facilitate the transfer of commodities. As the process of laying track requires some excavation in order to lay ballast, the contractors were operating heavy machinery on the property during the week of May 26, 1980. During these excavation activities, a contractor operating a bulldozer reportedly ruptured an apparently buried barrel containing a substance with an "obnoxious odor." Some of the barrel's contents sprayed on the driver and, after a period of time, he felt a burning on his skin. He "washed up" and returned to work, suffering no ill effects.

At about this same time, Monsanto was called (since the area was adjacent to a Monsanto landfill) and several individuals arrived to assist the contractor.[2] Upon arriving, these individuals did not find anything out of the ordinary. There were no signs of exposed barrels and a physical examination of the driver and his clothing by the Monsanto employees did not reveal any indication that he had been in contact with any chemical substance. Neither the drum nor the material which was released from the drum was ever discovered, nor were any samples taken. Following this incident, excavation for the day was stopped and a later determination by Pillsbury entirely ended all work on the track construction project.[3]

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[1] Due to the limited amount of information EPA supplied in its demand and Pillsbury's limited knowledge regarding the Site, the Company is not able to determine whether any part of the leased property is included within the boundaries of the Site. In fact, Pillsbury has uncertainties not only as to the boundaries of the Site, but also as to the exact reasons EPA thinks Pillsbury is liable for EPA's costs expended at the Site. While my colleague Lowell Rothschild spoke with EPA on December 10, 1997 and received a general idea of EPA's position regarding Pillsbury's alleged liability, EPA informed him that in order to receive copies of EPA's documents supporting its claim, he would need to submit a formal request under the Freedom of Information Act (FOIA). Mr. Rothschild sent EPA a FOIA request that day, but only received a reply January 12, 1998. There does not apper to be any information in that reply which further elaborates on the basis for EPA's demand. Nevertheless, due to EPA's assertion that this matter will be referred to the United States Department of Justice in the middle of this month, Pillsbury feels compelled to respond, despite its incomplete understanding of the basis for EPA's claim.

[2] In correspondence dated July 25, 1980, Monsanto indicated that it did not then own or lease, nor had it ever owned or leased, the area where the incident occurred.

[3] Pillsbury has had, at most, intermittent contact with various regulatory authorities concerning the leased property since the incident, the most recent of which, before your November 14,

It is this incident, which, according to EPA's December 10, 1997 phone conversation with Mr. Rothschild, has resulted in EPA's demand that Pillsbury pay EPA over One Hundred and Seventy Thousand Dollars, which Pillsbury understands was expended by EPA remedying substantial contamination at the chemical waste landfill operated by Monsanto at or near the leased property.

II. The legal standard of liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

In order to for EPA to recover its costs from Pillsbury under CERCLA, EPA must show that (1) Pillsbury falls into one of four categories of responsible persons and that (2) there was a release or threatened release of a hazardous substance (3) from a vessel or facility (4) which caused the incurrence of response costs. CERCLA § 107(a), 42 USC § 9607(a); See also Environmental Transportation Systems v. Ensco, 969 F.2d 503, 506 (7th Cir. 1992). EPA cannot meet its burden in this situation because EPA cannot show (1) that Pillsbury falls into any of the four categories of responsible parties; (2) that the substance released was hazardous; (3) that the location of the release was at the facility; or that (4) the release resulted in the incurrence of response costs by EPA.

III. Pillsbury is not a responsible party at the Site

As stated above, Pillsbury does not know whether the Site encompasses, in whole or in part, the leased property. However, it is Pillsbury's understanding that the contamination with which EPA has been concerned is the result of the operation of Monsanto's chemical waste landfill. The following discussion will proceed under the assumption that this understanding is correct.[4]

1997 letter, was a December 16, 1994 Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) section 104(e) request for information issued to Pillsbury by EPA.

[4] Pillsbury realizes that EPA could take the position that the barrel reportedly ruptured by the contractor is a "facility" under CERCLA and that Pillsbury is liable for EPA's response costs under CERCLA for the alleged release from that "facility." Pillsbury does not believe this to be the case, however, since it does not believe EPA could reasonably expend $170,000 remediating a fifteen year-old release from one barrel. For this reason, Pillsbury believes the "facility" to be the Monsanto Landfill.

A. Pillsbury is not a former owner or operator of the Site

Mr. Rothschild understands from his phone conversation with the Agency that EPA is proceeding on the theory that Pillsbury was the "operator" of the facility. This argument has no merit. The courts have not come to a conclusive determination of what constitutes "operation" of a facility, but they have placed certain parameters on the definition. Some courts require "actual control" of the facility, or an active role in the management thereof. See Jacksonville Electric v. Bernuth Corp., 996 F.2d 1107, 1110 (11th Cir. 1993) ("a person is liable as an 'operator' when that person actually supervises the activities of the facility. That is, the person must play an active role in the actual management of the enterprise."). Others require "day-to-day control," Acme Printing Ink Co. v. Menard, Inc., 870 F.Supp. 1465, 1484 (E.D.Wis. 1994) ("In order to be an operator under CERCLA, a party must exercise some kind of day-to-day control over operations at the site.") or "substantial control," Landsford-Coaldale Joint Water Authority v. Tonolli Corp., 4 F.3d 1209, 1221 (3rd Cir. 1993) (The court adopts the "actual control standard," in which "a corporation will only be held liable for the environmental violations of another corporation where there is evidence of substantial control exercised by one corporation over the activities of another.").

Nevertheless, despite their inability to agree on a precise definition of "operator," the courts all require there to be some degree of control over the facility's operations. In the case of Pillsbury, the Company had absolutely no control over the operation of the Monsanto landfill. It had no input into decisions about what wastes the landfill would accept, how long it would accept such wastes, from whom it would accept such wastes, what, if anything, it would charge for the wastes, or what standards would be implemented to prevent the release of the wastes. Indeed, the Company does not now, nor has it ever, even had any knowledge about these matters, let alone had any control over them.

Pillsbury finds it remarkable that EPA should seek to hold it liable for the operation of Monsanto's facility on the basis that one of the Company's contractors reportedly ruptured a barrel while preparing to install railroad trackage on the leased property. Even if the leased property were on the "Site," Pillsbury does not know of any case law which suggests that such minimal activity as that performed by Pillsbury's contractor on the leased property would constitute Pillsbury's "operation" of the Monsanto Landfill. Indeed, such an argument is so tenuous that Pillsbury does not believe it would be accepted by any court. Pillsbury was Monsanto's next-door neighbor after the landfill ceased operation, and that is all. The Company knows of no cases which hold an entity liable for the acts of another simply because they resided in adjacent facilities.

B. Pillsbury is not a current owner or operator of the Site

Pillsbury is not the present owner or operator of the Site, having transferred its lessee's interest at the Site to ConAgra in 1988.

C. Pillsbury is not a transporter

Pillsbury did not transport any waste to the Site, nor is Pillsbury aware of any allegation that it was a transporter.

D. Pillsbury is not a generator

Pillsbury is not liable at the Site as a generator. The Company did not generate any waste; it did not arrange for the disposal of any waste; it did not own or possess the drum which was ruptured. It is not even certain whether the punctured drum was located at the Site.

Plainly, Pillsbury is not a present or former owner or operator of the facility, nor did it generate waste which was transported to the Site or transport any waste to the Site. As a result, the Company cannot be held liable under CERCLA for costs at the Site.

IV. EPA cannot show that Pillsbury caused the release of a hazardous waste

Just as significantly, there is no evidence that Pillsbury caused the release of a hazardous substance. Such proof is a necessary precursor to any finding of liability. Memphis Zane May Assoc. v. IBC Manufacturing Co., 952 F.Supp. 541, 546 (W.D.Tenn. 1996) ("As an initial matter, plaintiffs must demonstrate a relationship between the defendant and the release of threatened release of a hazardous substance."). In other words, "the Government must. . . prove that the defendant's hazardous substances were deposited at the site." U.S. v. Alcan Aluminum, 964 F.2d 252, 266 (3rd Cir. 1992).

Here EPA has no evidence as to what was contained in the barrel which was reportedly ruptured by Pillsbury's contractor. No sample of the substance was found, taken or analyzed; the substance left no identifying marks on the bulldozer driver's skin or clothing; the barrel containing the substance was not discovered; and there no means of tracing the source or the contents of the barrel. In short, EPA simply does not know anything about the nature of the substance which was released and can do nothing but hypothesize about its nature.

Such conjecture is insufficient to create liability. As EPA is aware, "[m]ere speculation that materials contained hazardous substances is not sufficient to establish CERCLA liability." Dana Corp. v. American Standard, Inc., 866 F.Supp. 1481, 1533 (N.D.Ind. 1994). There must be proof, and EPA has none.

While EPA might attempt to argue the fact that since there are other hazardous substances buried in the Monsanto landfill, there is the possibility that the ruptured barrel contained a hazardous substance, this argument would be unsuccessful. In a similar situation, plaintiffs attempts to generalize about the type of waste present at a particular facility failed. Dana Corp., 866 F.Supp. at 1481. As a result, EPA cannot show that Pillsbury released a hazardous substance, or that the Company is liable for EPA's response costs.

V. Any release was geographically separate from the Site

Even if EPA were able to show that Pillsbury were otherwise liable for a release, the alleged Pillsbury "release" appears to be geographically removed from the contamination with which EPA is concerned and which EPA remediated. As a result, Pillsbury's "release," even if it occurred, was not at the Site.

VI. Any release did not cause the incurrence of response costs

The geographic disconnect described in Section V not only prevents EPA from showing that the Company's alleged release came from the Site, it also prevents EPA from proving that "Pillsbury's release" caused the incurrence of EPA's response costs at the facility.

VII. In no event should Pillsbury bear liability for the entirety of EPA's response costs.

Even if there were a valid basis to hold Pillsbury responsible for compensation of some of EPA's Site response costs, Pillsbury would not be required to compensate EPA for the entirety of its response costs. The geographic distance separating the Site from Pillsbury's release, discussed above as a possible reason why EPA cannot meet its burden in this matter, is also a reason to deny the application of CERCLA's joint and several liability. "[W]here two or more joint tortfeasors act independently and cause a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, then each is liable only for damages for its own portion of harm." U.S. v. Broderick investment Co., 862 F.Supp. 272, 276 (D.Colo. 1994). In other words, "the defendant can avoid joint and several liability by showing the harm is capable of being divided among its various causes... . This includes a showing that hazardous substances occupy 'separate and distinct geographic areas of contamination." Memphis Zane, 952 F.Supp at 548. Thus, the geographic distance in this case prevents the application of joint and several liability against Pillsbury.

In addition to the legal arguments in favor of divisibility, equity militates in favor of the same result. It is shocking to think that EPA is asking Pillsbury, a company whose absolute maximum alleged contribution to contamination at the Site resulted from the release from, at most, a 55-gallon drum, to compensate it for the entirety of it costs, while a company such as Monsanto, which operated a hazardous waste landfill taking in untold amounts of hazardous

substances over an extended number of years, is also a potentially responsible party. No judge in any court would ever require Pillsbury to pay all of EPA's costs in a case with facts such as the present one and Pillsbury does not believe EPA should ask it to do so.

VIII. Conclusion

EPA has demanded that Pillsbury remit $170,652.85 to EPA in restitution for costs expended by EPA at Site Q of the Area 2 Sauget Superfund Site at Sauget, Illinois. EPA has made this demand despite the fact that it cannot show that Pillsbury is a current or former owner or operator of the facility, that it caused the release of a hazardous substance or that a release for which Pillsbury is responsible caused the incurrence of EPA's response costs. Moreover, even if EPA could prove all of these statutory prerequisites, it would be inequitable, unfair and legally incorrect for EPA to seek reimbursement for the entirety of its costs against the Company. As a result of these factors, Pillsbury does not believe that it is liable to pay the costs demanded of it by EPA.

Please do not hesitate to call me at the above number if you have any questions or comments.

Very truly yours,
OPPENHEIMER WOLFF & DONNELLY LLP

Gary P. Gengel (LMR)

cc: Mr. David E. Schmidt
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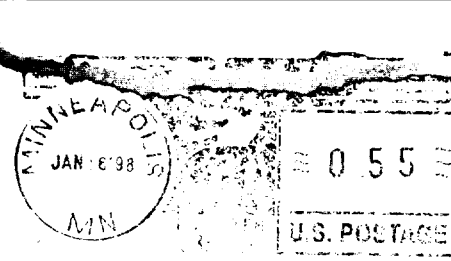

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